IN THE SUPREME COURT OF MISSOURI

No. SC93134

JODIE NEVILS,

Plaintiff-Appellant,

v.

GROUP HEALTH PLAN, INC., et al.

Defendants-Respondents

APPEAL FROM THE CIRCUIT COURT ST. LOUIS COUNTY

HON. THEA A. SHERRY

BRIEF OF AMICUS CURIAE

ASSOCIATION OF FEDERAL HEALTH ORGANIZATIONS

David M. Ermer, Pro hac vice
ERMER LAW GROUP, PLLC
1413 K St., NW, Sixth Floor
Washington, DC 20005

Christopher O. Bauman, #52480
Blitz, Bardgett & Deutsch, L.C.
120 South Central Ave., Suite 1650
St. Louis, MO 63105

ATTORNEYS FOR AMICUS CURIAE

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Curiae Association of Federal Health Organizations ("AFHO") is a trade association consisting of nine regular members who are employee organization carriers of Federal Employees Health Benefits Act ("FEHBA") plans and three associate members who are carriers of other types of FEHBA plans. AFHO member plans provide approximately seven million active and retired federal and postal employees, and their eligible family members, with health benefits coverage as an incident of their active or retired service as federal and postal employees.[1] Enrollees covered in AFHO member plans reside in all fifty of the United States, the District of Columbia, and the several overseas U.S. commonwealths and territories.[2]

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[1] The carriers of the following FEHBA plans belong to AFHO: Mail Handlers Benefit Plan, National Association of Letter Carriers Health Benefit Plan (HBP), American Postal Workers Union Health Plan, Government Employees Health Association Benefit Plan, Rural Letter Carriers Benefit Plan, Special Agents Mutual Benefit Association HPB, Compass Rose HBP, Foreign Service Benefit Plan, Panama Canal Area HBP (Regular Members), and the Aetna Life Insurance Co. the Blue Cross and Blue Shield Service Benefit Plan, and United Healthcare (Associate Members).

[2] The entire FEHBA program provides health benefits to approximately eight million federal employees and retirees, and their family members. Statement of OPM Associate Director Nancy Kichak before the House Oversight and Government Reform Subcommittee on the Federal Workforce (June 24, 2009).

All FEHBA plans, including those sponsored by respondent Group Health Plan ("GHP") as well as AFHO's members, are formed, organized, and operated under FEHBA, 5 U.S.C. §§ 8901-8914, the regulations promulgated thereunder by the U.S. Office of Personnel Management ("OPM") (*see* 5 U.S.C. § 8913; 5 C.F.R. Part 890; 48 C.F.R. Ch. 16), and the standard contracts into which OPM has entered with each plan's carrier. As mandated by FEHBA, each and every contract between OPM and a FEHBA carrier contains:

> [A] detailed statement of benefits offered [and includes] such maximums, limitations, exclusions, and other definitions of benefits as [OPM] considers necessary or desirable.

5 U.S.C. § 8902(d).

As it did with respondent GHP, OPM has determined that each AFHO member plan must include among the "limitations, exclusions, and other definitions of benefits" which OPM considers "necessary or desirable" a subrogation and reimbursement provision. Each such provision requires that a plan enrollee who receives benefits in connection with an injury or illness for which he or she receives a recovery from a third party must reimburse the plan for the amount of benefits paid by the plan.

Routine, systematic enforcement of these reimbursement provisions enabled AFHO member fee-for-service plans (all of AFHO's regular members and the Blue Cross government-wide service benefit plan) to recover over $50,000,000 in 2010, all of which (net of expenses incurred in pursuing reimbursements) was returned to the FEHBA plan reserve accounts held in the U.S. Treasury. 5 U.S.C. § 8909. Plan benefits are paid from

these reserve accounts. Were this Court to rule in Appellant's favor and thereby restrict the plan's ability to replenish the reserve accounts with these reimbursements, this number necessarily would drop. Moreover, an adverse ruling from this Court would disrupt the national uniformity in administration of the FEHBA's subrogation and reimbursement provisions that Congress sought when it added a state law preemption provision to the FEHBA. The decision may have repercussions in the other states that generally limit or prohibit health plans from engaging in subrogation or third party reimbursement actions.[3] Accordingly, we side with the Respondents in asking this Court to affirm the decision of the Circuit Court below.

[3] Laws in the following states, in addition to Missouri, have been read to generally prohibit subrogation or reimbursement activities by health plans: Arizona (*see Allstate Ins. Co. v. Druke*, 576 P.2d 489 (Ariz. 1978)), Connecticut (Conn. Gen. Stat. Ann. § 52-225c), Kansas (Kan. Admin. Reg. § 40-1-20), New Jersey (N.J. Stat. Ann. § 2A:15-97), New York (NY CLS Gen Oblig § 5-335), North Carolina (11 N.C. Admin. Code § 12.0319), and Virginia (Va. Code § 38.2-3405).

ARGUMENT

Congress, in enacting FEHBA, created a comprehensive statutory and regulatory scheme governing the administration of federal health benefits offered to federal and postal employees. As part of that scheme, Congress included an express preemption provision dictating that FEHBA contract provisions that relate to the "payment of benefits," such as the subrogation and reimbursement provisions at issue here, preempt and supersede state law that relates to health insurance or plans. 5 U.S.C. § 8902(m)(1). OPM, the agency tasked with implementing FEHBA and administering the FEHBA Program, has confirmed that it intended the subrogation and reimbursement provisions in its FEHBA plan contracts to preempt state law, such as Missouri's anti-subrogation law. *See* "FEHBA Program Carrier Letter No. 2012-18" titled "FEHBA Preemption of State Law re: Subrogation and Reimbursement" (June 18, 2013) (copy attached to Respondent GHP's brief). Moreover, even if FEHBA's express preemption provision did not apply, under the principles of *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-73 (2000), Appellant's claims are also preempted because they conflict with and stand as an obstacle to the federal government's administration of the FEHBA Program.

I. FEHBA provides a comprehensive statutory and regulatory scheme for federal employee health benefits administered by the federal government.

Congress enacted the FEHBA in 1959. Congress thereby added to the then-existing federal employee compensation package a voluntary group health insurance

program, the cost of which was to be shared by the federal government, as the employer, and the employees who decide to enroll in the FEHBA Program. Under FEHBA, the federal government covers approximately 75% of the health insurance premium and the enrollee pays the remaining amount. *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 684 (2006) (citing 5 U.S.C. §8906(b)).

As is the case with any legislation governing federal employee compensation, FEHBA's enactment was "historically and constitutionally within Congress' power" to the exclusion of other government authorities. *Puglisi v. United States*, 564 F.2d 403, 409 (Ct. Cl. 1977). The U.S. Court of Appeals for the District of Columbia has explained that

> Title 5 of the United States Code and its implementing regulations set forth in meticulous detail the compensation that attaches to positions in the government service. These provisions govern all incidents of employee compensation, including basic salaries; salary increases; overtime, holiday and sick pay; life and health insurance benefits; retirement benefits; travel and subsistence allowances; and compensation for injury and unemployment. These provisions are the exclusive source of employees' compensation rights.

Kizas v. Webster, 707 F.2d 524, 536 (D.C. Cir. 1983) (emphasis added). Congress' exclusive authority in this area stems from the appointment of the inferior officers clause and the necessary and proper clause of the U.S. Constitution. U.S. Const. art. II, § 2, cl. 2

and art. I, § 8, cl. 18. *See, e.g., United States v. Will*, 449 U.S. 200, 228 (1980); *Atkins v. United States*, 556 F.2d 1028, 1060 (Ct. Cl. 1977).

Rather than establish a program under which the government assumed the risk of providing health insurance coverage to its employees, Congress chose to assign that task to a variety of private sector "carriers" under a specialized federal procurement arrangement. Under this arrangement, OPM is granted broad responsibility to contract for four types of plans: one Government-wide service benefit plan (an AFHO associate member); one Government-wide indemnity benefit plan (currently vacant); employee organization plans (in which class the AFHO regular member plans fall), and comprehensive medical plans (in which class two AFHO associate members fall). 5 U.S.C. §§ 8902, 8903, 8903a. Thus, FEHBA plan carriers assist OPM in fulfilling a basic governmental task. *See Jacks v. Meridian Resource Co.*, 701 F.3d 1224, 1234-35 (8th Cir. 2012); *see also Watson v. Philip Morris Cos.*, 551 U.S. 142, 153 (2007).

FEHBA creates a comprehensive regulatory scheme for establishing and operating FEHBA plans. FEHBA specifies who may enroll for coverage and defines eligible family members for such coverage. 5 U.S.C. §§ 8901, 8906, 8908, 8914. FEHBA expressly authorizes OPM to determine enrollment for coverage, *id.* §§ 8902(f), 8905, 8908, and sets standards for the termination of coverage, *id.* §§ 8902(g), (h).

FEHBA establishes qualifications for FEHBA plan carriers as well, *id.* § 8901(7), (8), and it empowers OPM to set and enforce minimum standards for health benefit plans and their carriers, *id.* § 8902(e). FEHBA also establishes benefit types and levels, and it prescribes the method for setting plan rates. *Id.* §§ 8902(d), (i), 8904.

FEHBA provides for a significant government contribution toward the cost of coverage, *id.* § 8906, the establishment of a dedicated fund in the U.S. Treasury for handling all Program funds, and the establishment and OPM control of FEHBA plan contingency and FEHBA Program administration reserves. *Id.* § 8909.

FEHBA states that OPM must approve each health benefit plan contract and each plan's "detailed statement of benefits," which must include those "benefit maximums, limitations, exclusions, and definitions that OPM considers necessary or desirable." 5 U.S.C. § 8902(a), (d). FEHBA requires that every health benefit plan contract contain a provision requiring the carrier to pay any claim for a contract benefit at OPM's direction. *Id.* § 8902(j). It requires that each plan enrollee shall be issued "an appropriate document" describing the plan's benefits, claims procedures, and other principal provisions affecting the enrollee and any eligible family members. *Id.* § 8907.

FEHBA mandates that the plan contract shall require the carrier to make periodic reports on plan financing to OPM, and to cooperate with the audit of plan records by OPM representatives and the Government Accountability Office. 5 U.S.C. § 8910.

FEHBA renders OPM responsible for policing a carrier's performance of its FEHBA plan contract. 5 U.S.C. §§ 8902(e), 8913(a). For example, "[a] pattern of poor conduct or evidence of misconduct" – such as "[u]sing fraudulent or unethical business or health care practices or otherwise displaying a lack of business integrity or honesty" – is cause for OPM to withdraw approval of the carrier, terminate the health plan contract, and otherwise "effect corrective action." 48 C.F.R. § 1609.7001(c)(2), (d). OPM may take remedial action in the event of a "significant event" impacting the carrier or its

underwriter. *Id.* §§ 1622.103–70, 1652.222–70. OPM further is responsible for policing the conduct of the healthcare providers who treat FEHBA plan enrollees. 5 U.S.C. § 8902a.

In sum, FEHBA, at the direction of Congress, places the FEHBA Program under OPM's direct and extensive control, and it empowers OPM to make such contracts and to prescribe such regulations and other guidance as it deems necessary to carry out FEHBA's purposes. *Id.* §§ 8902, 8913.[3] As discussed above, those contracts and statements of benefits include subrogation and reimbursement provisions like those at issue here.

The U.S. Court of Appeals for the Eighth Circuit recently recognized that this OPM/carrier relationship is so close that it authorizes federal removal jurisdiction under the federal officer removal statute, 28 U.S.C. § 1442(a)(1), in lawsuits against FEHBA plan carriers. Moreover, in its ruling, *Jacks v. Meridian Resource Co.,* 701 F.3d at 1232, 1235, that Court reversed the district court decision in *Jacks* cited by Appellant in his brief (Appellant's Brief, at 23) and rejected the *Van Horn v. Arkansas Blue Cross and Blue Shield*, 629 F. Supp. 2d 905 (E.D. Ark. 2007), precedent upon which Appellant principally relies therein (Appellant's Brief, at 6, 15-16).

II. FEHBA expressly preempts Missouri's anti-subrogation law.

Federal employees, including Jodie Nevils, have the unqualified right, if they desire, to enroll in the FEHBA Program through their employing federal agency or the Postal Service. They do so by following an OPM-approved process established under the

FEHBA. *See* 5 U.S.C. § 8905(a); 5 C.F.R. §§ 890.101(a), 890.102, 890.301. Consequently, they obtain that health plan coverage solely by enrolling in the statutory FEHBA fringe benefit program offered by their employer, the federal government or the U.S. Postal Service. *See Zucker v. United States*, 758 F.2d 637, 640 (Fed. Cir. 1985):

> [F]ederal workers serve by appointment, and their rights are therefore a matter of "legal status" even where compacts are made. *Kania v. United States*, 650 F.2d 264, 268, 227 Ct Cl. 458, cert. denied, 454 U.S. 895 (1981). In other words, their entitlement to retirement benefits must be determined by reference to the statute and regulations governing these benefits, rather than to ordinary contract principles. *United States v. Larionoff*, 431 U.S. [864] at 869 [(1977)].

Enrollees thereby subscribe to the OPM contract and the statement of benefits approved by OPM for their selected plan, including its subrogation and reimbursement provisions, and submit to OPM's regulatory requirements.

A. FEHBA includes an express preemption provision which preempts Missouri's anti-subrogation law.

In 1975, the Comptroller General of the United States advised Congress that because the states were becoming increasingly "active in establishing and enforcing health insurance requirements," Congress should "clarify whether State requirements should be permitted to alter terms of contracts negotiated pursuant to the [FEHBA]." S. Rep. No. 95-903, 95th Cong., 2d Sess. at 9 (1978). The Civil Service Commission

("CSC"), OPM's predecessor as FEHBA Program administrator, shared that view. In reliance on its general counsel's opinion, CSC took the position that:

> The Supremacy Clause [of the U.S. Constitution, art. VI, § 2] creates an immunity from state interference of federal operations. The principles underlying the need for national uniformity in the administration of Federal functions operate to supersede conflicts arising from State laws and apply with equal regard to the Commission's administration of the [FEHBA]. The McCarran-Ferguson Act by its terms and the interpretations of the courts in no way diminishes the supremacy of the [FEHBA] over State laws. If the Commission is to have a free hand it needs to administer the Federal Employees Health Benefits Act, no other conclusion can be reached.

Id. at 8. Concerned that "[t]hese [State] laws in effect presented serious problems from the standpoint of the uniformity of benefits under the Program," *id.* at 7, CSC urged Congress to ensure "that the [FEHBA] Program – a program established by an Act of Congress – should not be subject to alteration or regulation by State legislatures or State insurance boards." H.R. Rep. No. 95-282, 95th Cong., 1st Sess. 1, 4 (1977).

Congress recognized specifically that imposition of State law requirements on FEHBA contracts would result in:

> Increased premium costs to both the Government and enrollees, and

> A lack of uniformity of benefits for enrollees in the same plan which would result in enrollees in some States paying a premium based, in part, on the cost of benefits provided only to enrollees in other States.

Id. *See also* S. Rep. No. 95-903, supra, at 2, 4, 9. Congress also recognized that, absent federal legislation affirming federal supremacy in this area,

> Enforcement of this preemption policy w[ould] almost inevitably lead to time consuming and costly litigation with the States until [the CSC's] position is upheld . . . .

H.R. Rep. No. 95-282, supra, at 3.

In 1978, Congress amended FEHBA to include 5 U.S.C. § 8902(m)(1),[4] which read as follows:

> The provisions of any contract under this chapter which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans to the extent that such law or regulation is inconsistent with contractual provisions.

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[4] This form of this preemption provision is common among federal employee benefit programs. *E.g.,* 5 U.S.C. § 8709(d)(1) (life insurance); 5 U.S.C. § 8959 (dental benefits); 5 U.S.C. § 8989 (vision benefits), and 5 U.S.C. § 9005(a) (long term care benefits).

As the legislative history confirms, Congress did not regard this provision as a statute which would restrict the reach of otherwise applicable state law. To the contrary, Congress recognized that the FEHBA, as a federal personnel statute, was from the outset beyond the reach of State law. Section 8902(m)(1) thus was added to FEHBA to state that proposition explicitly, and thereby hopefully to save the litigation costs required to affirm it judicially.

In 1998, Congress clarified 5 U.S.C. § 8902(m)(1) by deleting that final clause which predicated FEHBA preemption upon a conflict with state law. As now codified, FEHBA provides that

> The terms of any contract under this chapter [5 U.S.C. § 8901 et seq.] which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans.

5 U.S.C. § 8902(m)(1).

The House Report accompanying the bill explained that Congress intended the amendment

> to broaden the preemption provisions in current law to strengthen the ability of national plans to offer uniform benefits and rates to enrollees regardless of where they live.

H.R. Rep. No. 105-374, 105th Cong., 1st Sess. 9 (1997); *see also* S. Rep. No. 105-257, 105th Cong., 2nd Sess., at 9 (1998). Additionally, Representatives Elijah Cummings and

John Mica pointed out on the House floor that, with the goal of ensuring uniform provision of benefits to federal employees across the country, the amendment would fortify FEHBA's preemptive effect over local and state law. 144 Cong. Rec. H9354 (daily ed. Oct. 5, 1998).

Appellant's theory of liability is premised on the argument that Missouri's anti-subrogation law supersedes the terms of the Respondent GHP's FEHBA contract, including its subrogation and reimbursement provisions. Appellant's argument must fail because the FEHBA expressly requires that these contract terms that relate to the payment of benefits "supersede and preempt" state law. The Court of Appeals has addressed this issue, and has held that FEHBA preempts Missouri anti-subrogation law. *Buatte v. Gencare Health Sys., Inc.,* 939 S.W.2d 440, 442 (Mo. App. E.D. 1996). The U.S. Court of Appeals for the Eighth Circuit has reached this very same conclusion in *Medcenters v. Ochs*, 26 F.3d 865, 867 (8th Cir. 1994). Indeed, these two decisions were rendered during the time when FEHBA's preemption provision was *narrower* than its current form, making preemption even more appropriate now in light of the preemption provision's 1998 expansion, discussed above.

B. OPM has affirmed that FEHBA expressly preempts state anti-subrogation law.

OPM recently confirmed that it intends the FEHBA plan contracts' subrogation and reimbursement terms to preempt state law. On June 18, 2012, OPM issued a "FEHBA Program Carrier Letter No. 2012-18" titled "FEHBA Preemption of State Law

re: Subrogation and Reimbursement" (copy attached to Respondent GHP's brief). In relevant part, this OPM directive states:

> Some states are not allowing [Federal Employees Health Benefits] FEHB Program carriers to collect subrogation and/or reimbursement recoveries due to state law that either prohibits or limits these recoveries. This is to advise you that the Federal Employees Health Benefits Act (FEHBA) preempts state laws prohibiting or limiting subrogation and reimbursement. As a result, FEHB Program carriers are entitled to receive these recoveries regardless of state law. . . .
>
> FEHB Program contracts and the applicable statement of benefits (brochures) require enrollees to reimburse the plan in the event of a third party recovery. Carriers are required to seek reimbursement and/or subrogation recoveries in accordance with the contract. The funds received by experience-rated carriers from these recoveries are required to be credited to Employees Health Benefits Fund established by 5 U.S.C. § 8909, held by the Treasury of the United States, and for experience-rated carriers and most community-rated carriers, subrogation and reimbursement recoveries serve to lower subscription charges for individuals enrolled in the Federal Employees Health Benefits Program. The carrier's right to subrogation and /or reimbursement recovery is both a condition of, and a limitation on, the payments that enrollees are eligible to receive for benefits; the carrier's contractual obligation to obtain them necessarily

> relates to the enrollee's coverage or benefits (including payments with respect to benefits) under the FEHB Program. These recoveries therefore fall within the purview of the FEHBA's preemption clause, and supersede state laws that relate to health insurance or health plans.
>
> As the Federal agency with regulatory authority over the FEHB Program, OPM has consistently recognized that the FEHBA preempts state laws that restrict or prohibit FEHB Program carrier reimbursement and/or subrogation recovery efforts, and we continue to maintain this position.

OPM Letter at 1-2.

1. The OPM letter is entitled to judicial deference.

This Court properly has afforded judicial deference to federal agency interpretations of federal law, such as the OPM Letter. *See Wimberly v. Labor & Industrial Relations Comm'n*, 668 S.W.2d 344, 349-50 (1985), *aff'd*, 479 U.S. 511 (1987); *see also City of Arlington v. FCC*, No. 11-1545, 569 U.S. ___, 2013 U.S. Lexis 3838, Slip Op. at 5 (May 20, 2013) (holding that a court must defer to an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's jurisdiction as long as "the agency has stayed within the bounds of its statutory authority."). The OPM Letter is worthy of such respect when it is persuasive. *St. Mary's Hospital v. Leavitt*, 416 F.3d 906 (8th Cir. 2004). That is the case here.

The OPM Letter explains the agency's reasoning in detail, citing relevant case law. Moreover, the agency's interpretation was recognized as "plausible" by the U.S.

Supreme Court in the *McVeigh* case -- as discussed below -- and is the product of OPM's careful consideration of the issue since the U.S. Supreme Court decided *McVeigh* nearly seven years ago. Indeed, as the OPM Letter states (at 2), OPM "consistently has recognized that

the FEHBA preempts" state anti-subrogation laws.[4]

2. Preemption advances important federal interests.

Appellant asserts that preemption should not apply because FEHBA's express preemption provision "is open to more than one plausible reading." Appellant's Br. at 18. OPM's carrier letter makes clear that there is only one plausible reading of the

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[4] The OPM Letter (at 2) states that

> The United States Supreme Court provided, in *Empire Healthchoice Assurance, Inc. v. McVeigh* that it is plausible to construe subrogation and reimbursement contract terms as a condition or limitation on benefits received by a Federal employee, allowing these FEHB Program contract requirements to preempt state law according to 5 U.S.C. § 8902(m)(1). See 547 U.S. 677, 697- 698 (2006). OPM maintains this construction of the statute allowing for preemption of state laws relating to subrogation and reimbursement.

As further evidence that OPM's interpretation of *McVeigh* is consistent with industry practice, we note that the Department of Health and Human Services defines the term "payment" purposes to include subrogation and reimbursement activities for purposes of the HIPAA Privacy and Security Rules, 45 C.F.R. § 160.103.

FEHBA preemption provision – "that FEHBA preempts state laws that restrict or prohibit FEHB Program carrier reimbursement and/or subrogation recovery efforts." OPM Letter at 2. Appellant seeks to have the state court interfere with the operation of a federal employee benefit program administered by OPM by imposing damages, including punitive damages, on GHP in its capacity as a federal contractor for implementing a cost-containment feature of the federal health benefits plan mandated by OPM. Preemption is necessary to further the uniquely federal interests underlying FEHBA, including the government's interests in federal insurance programs and in the federal employees enrolled in those programs.[5] Nor in view of the legislative history outlined above, can there be doubt that Congress intended for preemption to apply here.

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[5] In *McVeigh*, 547 U.S. at 685, the U.S. Supreme Court considered whether FEHBA so "completely preempts" state law that it converts a state law reimbursement dispute into a federal claim for jurisdictional purposes. While that question is not at issue here, it is worth noting that both the U.S. Supreme Court and the U.S. Court of Appeals for the Second Circuit (whose decision the Supreme Court affirmed in *McVeigh*) held that reimbursement of benefits under the FEHB Program raises "distinctly federal interests." *See id.* at 688 (citing *Empire HealthChoice Assurance, Inc. v. McVeigh*, 396 F.3d 136, 150 (2d Cir. 2005) (Sack, J., concurring) and 696 ("distinctly federal interests are involved" in part because the FEHB plan contract "is negotiated by a federal agency and concerns federal employees"). The dissent in *McVeigh* also found that distinctly federal

Congress included an express preemption provision in the FEHBA, revealing its intent to preserve and protect the federal interests relating to the provision of federal benefits to federal employees – specifically uniform administration of contract provisions related to benefits and payments with respect to benefits. Notably, FEHBA's express preemption provision is broader than express preemption under its private sector analog, the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144(a), (b), in that it has no state insurance law savings clause. *See Hayes v. Prudential Ins. Co. of Am., Inc.*, 819 F.2d 921 (9th Cir. 1987):

> Our holding [in favor of FEHBA preemption of state law] is supported by the [U.S.] Supreme Court's [then] recent decision that the Employee Retirement Income Security Act (ERISA) preempts state common law tort and contract claims for benefits under an ERISA-regulated plan. *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987). ERISA's preemption clause is similar to section 8902(m)(1) of the FEHBA. And the [U.S. Supreme] Court held that the state claims were preempted despite a savings clause [for state insurance laws], 29 U.S.C. § 1144(b)(2)(A), which has no counterpart in the FEHBA.

Id. at 926.

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interests were involved, in part because of the federal interest in interpreting the FEHBA plan contract uniformly. *Id.* at 709, 711 (Breyer, J., dissenting).

Thus, in ERISA – which governs *private* employee benefit plans – Congress explicitly left room for the states to regulate in certain fields, such as insurance, that they have traditionally occupied. But in FEHBA – which governs a *federal* employee benefit plan – Congress left no such room.

III. Appellant's claims are barred by conflict preemption.

Appellant seeks to enjoin GHP, a federal government contractor, from performing its obligations under a FEHBA contract. Appellant also seeks to impose damages – including punitive damages – on GHP, in its role as a federal contractor, for having faithfully performed its obligations under the federal contract. Because Appellant's claims conflict with and stand as an obstacle to the federal government's administration of the FEHBA program, the Supremacy Clause bars Appellant's claims.

A. State law that conflicts with federal law is preempted.

"A fundamental principle of the Constitution is that Congress has the power to preempt state law." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. at 372. In addition to express preemption, preemption arises, among other circumstances, when a state law conflicts with federal law in such a way that it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 373. This "conflict preemption" applies with equal force to state common law and statutory law. *See, e.g., Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 886 (2000) (finding state tort law conflicted with and was preempted by federal regulations). Where Congress seeks uniform standards, or exclusive remedies, state laws that distort the

federal scheme are preempted. *See Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 52-53 (1987) (state-law remedies are preempted by the exclusive and comprehensive remedial scheme contained in the ERISA statute); *Weiss v. Wells Fargo Bank, N.A.*, No. 07-5037-CV-SW-WAK, 2008 WL 2620886, at *2 (W.D. Mo. July 1, 2008) (state law preempted where it impaired the uniform operation of a national program); *Chae v. SLM Corp.*, 593 F.3d 936, 944-45 (9th Cir. 2010) (state law preempted where Congress intended for a federal program to operate uniformly).

Conflict preemption applies where state law thwarts the full effectuation of a federal program, even if the governing law is not preemptive on its face, or even if the express preemption provision does not reach the state law claims at issue. *See Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 155, 156-57 (1982); *see also Pilot Life*, 481 U.S. at 54 (relying on conflict preemption and not separate express preemption provision of ERISA to preempt state law claims). State law also may not throw up obstacles to policies that the administering agency deems – in its discretion – necessary to validate the program's purpose. *Fidelity*, 458 U.S. at 156. This principle encompasses not only regulations, but also contracts entered into pursuant to a federal program. *Id.* at 156-57. Where an agency enjoys discretion in negotiating federal contracts, as OPM does, the terms of the resulting agreement have preemptive effect. *See id.* at 157-59 (holding that Federal Home Loan Bank Board's policy of allowing savings and loan associations to use

"due-on-sale" clauses in mortgage contracts preempted state law declaring such clauses illegal).[6]

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[6] In *Dan's City Used Cars. Inc. v. Pelkey*, -- U.S. --, 2013 U.S. Lexis 3520 (2013), the U.S. Supreme Court recently held that

> Where, as in this case, Congress has superceded state legislation by statute, our task is to identify the domain expressly preempted. To do so, we focus first on the statutory language, "which necessarily contains the best evidence of Congress' pre-emptive intent."

(Internal quotation marks and citations omitted.) We agree, and we submit that the FEHBA as interpreted by OPM expressly preempts Missouri's anti-subrogation law. However, nothing in the *Dan's City* opinion suggests that conflict preemption cannot apply where the relevant statute includes an express preemption provision. Indeed, in 2002, the U.S. Supreme Court in *Sprietsma v. Mercury Marine*, 537 U.S. 51, rejected an argument that the express preemption clause in that case (relating to the Federal Boat Safety Act) precluded conflict preemption analysis. The Court stated in *Sprietsma* that:

> Congress' inclusion of an express pre-emption clause does not bar the ordinary workings of conflict preemption principles that find implied preemption where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

B. Appellant's state law claims are preempted because they conflict with OPM's administration of the FEHBA program.

FEHBA reflects Congress' intent to create uniform federal standards for the administration of federal benefits to federal employees. *See Botsford v. Blue Cross & Blue Shield of Mont., Inc.*, 314 F.3d 390, 395 (9th Cir. 2002) ("application of different state standards would disrupt the nationally uniform administration of benefits" under FEHBA). Missouri's anti-subrogation policy directly interferes with OPM's strongly expressed policy, stated in the OPM Letter, that the subrogation and reimbursement provisions in the FEHBA plan contracts must be enforced in order to control FEHBA Program costs and maintain relative equities among enrollees who live in different states.

Congress delegated to OPM the authority to so direct the conduct and practices of FEHBA carriers, as discussed above. *See* OPM Letter at 1-2. Because enforcement of the federal policy stated in the OPM Letter cannot be reconciled with Missouri's anti-subrogation law, that state law must yield to federal law as dictated by the Supremacy Clause of the U.S. Constitution, art. VI, § 2. *See Fidelity*, 458 U.S. at 156 ("By further limiting the availability of an option the [federal agency] considers essential to the economic soundness of the [regulated industry], the State has created 'an obstacle to the

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Id. at 65 (Emphasis in original; internal quotation marks and citations omitted). The *Sprietsma* decision remains good law, and our discussion of conflict preemption here further buttresses OPM's interpretation of the FEHBA's state law preemption provision.

accomplishment and execution of the full purposes and objectives' of the . . . regulation."); *see also Crosby*, 530 U.S. at 372 ("We will find preemption where it is impossible for a private party to comply with both state and federal law.").

CONCLUSION

For all of the foregoing reasons, as well as those put forth in Respondents' briefs on the merits, amicus curiae Association of Federal Health Organizations respectfully urges the Court to affirm the Circuit Court's decision and hold as a matter of law that the FEHBA preempts Missouri's anti-subrogation law.

Respectfully submitted,

/s/ David M. Ermer

David M. Ermer, Pro hac vice
ERMER LAW GROUP, PLLC
1413 K St., NW, Sixth Floor
Washington, DC 20005
Telephone No.: (202) 833-3400
Facsimile No.: (202) 223-0120
E-mail: dermer@ermerlaw.com

/s/ Christopher O. Bauman

Christopher O. Bauman, #52480
Blitz, Bardgett & Deutsch, L.C.
120 South Central Ave., Suite 1650
St. Louis, MO 63105
Telephone No.: (314) 863-1500
Facsimile No.: (202) 863-1877
E-mail: cbauman@bbdlc.com

ATTORNEYS FOR AMICUS CURIAE
ASSOCIATION OF FEDERAL HEALTH
ORGANIZATIONS

CERTIFICATE OF COMPLIANCE

In compliance with Missouri Supreme Court Rule 84.06(c), counsel for Amicus Curiae Association of Federal Health Organizations states that this Brief is in compliance with the limitations of Rule 84.06(b), is in Microsoft Word format using Times New Roman 13 point font and contains 6,097 words, exclusive of the cover, certificate of service, this certificate of compliance, and signature block.

/s/ David M. Ermer

David M. Ermer

CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2013, I electronically filed the foregoing with the Clerk of the Missouri Supreme Court by using the Missouri eFiling system. I certify that all participants in the case are registered eFiling users and that service will be accomplished by the Missouri eFiling system.

/s/ Christopher O. Bauman

Christopher O. Bauman